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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1930

No. 6

WILLIAM J. STRATTON, SECRETARY OF STATE OF THE STATE OF ILLINOIS,

Appellant,

VS.

ST. LOUIS SOUTHWESTERN RAILWAY COMPANY, A CORPORATION,

Appellee.

Appeal from the United States Circuit Court of Appeals for the Seventh Circuit.

STATEMENT, BRIEF AND ARGUMENT FOR APPELLANT.

STATEMENT OF THE CASE.

MAY IT PLEASE THE COURT:

This is an appeal from a decision of the United States Circuit Court of Appeals for the Seventh Circuit, reversing a decree of the District Court of the United

States for the Southern District of Illinois, and remanding the cause to that Court with directions to enter a decree consistent with the views expressed in the opinion of said Circuit Court. The opinion of that Court appears at pages 52-56 of the printed transcript of the record, and is contained in 30 Fed. (2nd) 322. The opinion of the District Court sustaining the motion of appellant to dismiss the bill of complaint for want of equity is set forth at pages 30-36 of the record, and is reported in 27 Fed. (2nd) 1005.

The appellee herein, St. Louis Southwestern Railway Company, is a corporation organized under the laws of the State of Missouri and has been authorized to do business in the State of Illinois. The annual report filed by it with the Secretary of State in February, 1927, showed that its authorized capital stock was $130,000,000, of which $36,249,750 was actually issued and outstanding. It was engaged in both intrastate and interstate transportation of freight and passengers as a common carrier. The total value of its road and equipment alone was $76,793,697.78, and its total business during the preceding year 1926 amounted to $18,201,955.32. The total length of its railroad tracks in all states was 940.58 miles. The value of its property in Illinois was reported as $786,196 and $15,000, or $801,196, and the business transacted by it in that State in 1926 amounted to $2,868.36 (R. 2-3, 11-13).

Section 102 of the Illinois Corporation Act requires both domestic and foreign corporations, including railroads, to make a report in writing to the Secretary of State in February of each year on forms furnished by him. The report relating to property and business is made for the preceding calendar year and is required to disclose such facts as to enable him to ascertain the proportion of capital stock represented by business transacted and tangible property located in that State, in order to assess the annual license fee or franchise tax in advance for the next year beginning July 1. Sections 105, 106 and 107 of said Act provide for the payment of the fee or tax to be assessed as follows:

> Section 105. Each corporation for profit including railroads, except insurance companies, heretofore or hereafter organized under the laws of this State or admitted to do business in this State, and required by this act to make an annual report, shall pay an annual license fee or franchise tax to the Secretary of State of five cents on each one hundred dollars of the proportion of its issued capital stock, or amount to be issued at once, represented by business transacted and property located in this state, **but in no event shall the amount of such license fee or franchise tax be less than that required by this act of corporations having no property or business in this state.**
>
> Section 106. In ascertaining the amount of the capital stock represented by business transacted and property located in this State, the sum of the business of any foreign or domestic corporation transacted in this State and the total property of such corporation located within this State shall be divided by the sum of the total property of the corporation wherever situated.

Section 107. In case it appears from the annual report that the corporation has no property located in this state, and is transacting no business in this state, the following fees shall be paid annually to the Secretary of State as an annual franchise tax: All such corporations having issued capital stock of $50,000 or less shall pay an annual fee of $10; corporations having issued capital stock of more than $50,000, but not exceeding $200,000, shall pay an annual fee of $15; corporations having issued capital stock of more than $200,000, but not exceeding $500,000, shall pay an annual fee of $20; corporations having issued capital stock of more than $500,000, but not exceeding $1,000,000, shall pay a fee of $50; corporations having issued capital stock of more than $1,000,000, but not exceeding $10,000,000, shall pay a fee of $200; corporations having issued capital stock of more than $10,000,000, but not exceeding $20,000,000, shall pay a fee of $500; **and all corporations having issued capital stock in excess of $20,000,000 shall pay an annual fee of $1,000.**

From the annual report filed by appellee, as above stated, it appeared that if its annual license fee were computed at the rate specified in Section 105 on the proportion of issued capital stock represented by property and business in Illinois during the preceding year, under the formula provided by Section 106, the tax would amount to only the sum of $135.21. However, as appellee had issued capital stock in the amount of $36,249,750, it appeared that it should pay an annual fee of $1,000 for the renewal of its privilege of doing business in Illinois for the next year, under the last clauses of Sections 105 and 107. Therefore, the Secretary of State assessed such required minimum fee against appellee as a franchise

tax for the next year, being the minimum fee of $1,000 provided by Section 107 for corporations having issued capital stock in excess of $20,000,000 (R. 3-5).

On July 21, 1927, appellee filed its bill of complaint in said District Court to enjoin the collection of the tax so assessed against it, on the alleged ground that such a tax would place an unreasonable burden upon interstate commerce and deprive appellee of its privileges and immunities as a citizen under paragraph 3 of Section 8, and Section 10 of Article 1, and Section 2 of Article IV, respectively, of the Constitution of the United States, and would also deny it the equal protection of the laws and deprive it of its property without due process of law, in violation of Section 1 of the Fourteenth Amendment to the Constitution of the United States (R. 5-8).

The appellant filed a motion to dismiss the bill of complaint for want of equity and upon the hearing, the District Court allowed the motion and entered a decree dismissing the bill, pursuant to a written opinion which upheld the provisions of said Act as constitutional (R. 30-38). From this decree, appellee appealed to said Circuit Court, which held in substance that said Section 107 would impose an unlawful burden upon the interstate commerce of appellee and take its property without due process of law, and therefore reversed the decree of the District Court and directed it to enter a decree consistent

with the views stated. The petition of appellant for rehearing was denied and an appeal was then taken by him to this Court (R. 52-58).

All of the errors assigned are specified and relied upon by appellant for reversal. In substance they urge that said Circuit Court erred in reversing the decree of the District Court and directing it to enter a decree consistent with the views expressed by the Circuit Court, and in refusing to approve and affirm the decree of the District Court; that the Circuit Court erred in holding that said Section 107, as applied to foreign corporations such as appellee, imposes an invalid tax under the decisions of this Court, or an unlawful burden upon the capital and property of appellee outside the State of Illinois, or an illegal burden upon its interstate commerce, or discriminates against it or takes its property without due process of law, contrary to the commerce clause of the Constitution or the Fourteenth Amendment; and in refusing to hold that said Section 107, as applied to appellee, pursuant to the last clause of Section 105 of said Act, does not violate any provision of the Federal Constitution or the Fourteenth Amendment thereto (R. 58-60).

The Illinois Corporation Act requires all corporations organized or admitted to do business in that State and making an annual report, to pay annually at least the minimum fees specified in Section 107 of said Act, as

an excise or franchise tax for the right or privilege granted of doing business in that State during the next year. The tax is assessed in advance and it is assumed that the corporation will use a sufficient amount of its capital stock in the State to produce the minimum tax assessed at the rate specified in Section 105, or if not, that it should nevertheless pay such tax for the privileges granted to it by the State. In the event that the corporation shall use a larger proportion of its capital stock in the State, then the tax for the next year will be assessed upon such larger proportion at the rate fixed in Section 105, and the corporation will then be required to pay a larger tax on that basis.

The position of the appellant is that the State has the right to impose a reasonable minimum fee or tax in advance, for the privileges granted by it to a corporation to use its capital in carrying on a local business in the State during the next year, even though such privilege may not have been actually exercised to a substantial extent during the preceding year. The tax is imposed as a minimum fee for the privileges granted, which the corporation has a right to exercise if it shall desire to do so. Such a tax does not discriminate against any foreign or domestic corporation, but is applied uniformly to all corporations alike, under the same circumstances. It is a tax upon the privileges granted and does not affect property outside the State. Neither is it designed or intended to impose any burden on interstate commerce, nor does it have that effect.

SUMMARY OF ARGUMENT.

I.

The Illinois Corporation Act fixes a reasonable minimum fee for granting the privilege of doing business in that State.

The provision of Section 105 for the payment of an annual license fee or franchise tax at the specified rate on the proportion of capital stock represented by property and business in the State, is subject to the further provision that such fee or tax shall not be less than the minimum fee fixed by Section 107, with a maximum limit in the amount of the tax, for the privilege granted of doing business in the State.

General Corporation Act, Ill. Rev. Stats., Chap. 32, Secs. 105, 107.

O'Gara Coal Co. v. *Emmerson*, 326 Ill., 18, 43-4 (*Colgate & Co.* and *Beatrice Creamery Co.*)

II.

The principle of a graduated fee or franchise tax with a reasonable maximum limit has been repeatedly approved by this Court.

The provisions of the Act which require all corporations organized or admitted to do business in Illinois to

pay annually a minimum license fee or franchise tax, which is graduated to some extent upon the amount of issued capital stock and is limited to the specified maximum amount of tax, fix a reasonable excise or franchise tax for the privileges granted and do not violate any constitutional provision.

General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;

Cheney Bros. Co. v. *Massachusetts*, 246 U. S., 147, 154-8;

Kansas City Ry. Co. v. *Kansas*, 240 U. S., 227, 232-5;

Baltic Mining Co. v. *Massachusetts*, 231 U. S., 68, 82-7;

Postal Tel. Cable Co. v. *Adams*, 155 U. S., 688, 698.

III.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee, or tax property outside the State.

The statute and the tax imposed in this case conform to the rule adopted by this Court that, while the State may not regulate interstate commerce or impose burdens upon it, it is authorized to levy a tax within its authority, measured by the capital stock in part used in the conduct of such commerce, where the circumstances

are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character.

Western Cartridge Co. v. *Emmerson*, 281 U. S., 511, 513;

Hump Hairpin Mfg. Co. v. *Emmerson*, 258 U. S., 290, 294;

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S., 113, 120;

United States Glue Co. v. *Oak Creek*, 247 U. S., 321, 326;

Peck & Co. v. *Lowe*, 247 U. S., 165, 173-5;

Kansas City M. & B. R. R. Co. v. *Stiles*, 242 U. S., 111, 119;

Kansas City, etc., Ry Co. v. *Kansas*, 240 U. S., 227, 234.

New York v. *Latrobe*, 279 U. S., 421;

International Shoe Co. v. *Shartel*, 279 U. S., 429.

IV.

The United States Circuit Court of Appeals apparently misconceived the nature of the tax and its effect upon the business and property of appellee.

Opinion of Circuit Court, Record pp. 52-56;

Bill of Complaint, Record pp. 2-4, 11-13;

General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;

Looney v. *Crane Co.*, 245 U. S., 178, 189-190;

International Paper Co. v. *Massachusetts*, 246 U. S., 135, 143-5;

Hanover Fire Ins. Co. v. *Harding*, 272 U. S., 494;

Postal Tel. Cable Co. v. *Adams*, 155 U. S., 688, 698.

The District Court in its decision construed the statute correctly and properly dismissed the bill of Complaint for want of equity.

Memorandum of Views of District Court, Record pp. 30-36;

General Railway Signal Co. v. *Virginia*, 246 U. S., 500, 511;

Cases distinguished:

International Paper Co. v. *Mass.*, 246 U. S., 135, 143-5;

Western Union Tel. Co. v. *Kansas*, 216 U. S., 1;

Looney v. *Crane Co.*, 246 U. S., 178, 189-190;

Cudahy Packing Co. v. *Hinkle*, 278 U. S., 460.

ARGUMENT.

I.

The Illinois Corporation Act fixes a reasonable minimum fee for granting the privilege of doing business in that State.

The bill of complaint in this case clearly shows that appellee was required, pursuant to the last clause of Section 105, to pay the minimum franchise tax specified in Section 107 of the Act for the privilege granted of doing a local business in the State during the next year, inasmuch as appellee had not used a sufficient proportion of its capital stock in this State the preceding year to make it subject to a larger tax under the rate specified in Section 105.

The real question in this case is, whether or not the State may require a corporation organized or admitted to do business in the State, to pay a minimum fee or franchise tax, as provided in Sections 105 and 107, for granting it the privilege of doing business in the State during the next year, although it may not have actually exercised its franchise in the State the preceding year to a sufficient extent to produce such an amount of tax at the rate specified in Section 105.

Sections 105 and 107 of the Corporation Act should be considered and construed together. The effect of both sections is to require every corporation, which desires to maintain the right or privilige of transacting local business in the State, to pay at least the fee specified in Section 107, based within limits on the amount of

issued capital stock which it may use in the State. However, if the rate specified in Section 105, applied to the proportion of the capital stock actually represented by its property and business in the State will produce a larger tax, then such larger tax must be paid, instead of the minimum fee. In such case, the fee is increased in direct proportion to the exercise of the privilege by the corporation.

The amount of issued capital stock of appellee in this case is $36,249,750. As this amount is in excess of $20,000,000, the minimum fee to be paid is $1000, which is the maximum amount provided by Section 107. A tax at the rate of five cents on each one hundred dollars, as specified in Section 105, would require the use of only $2,000,000 in the State to produce a tax amounting to $1000. The amount so required to be used is only about 5.5% of appellee's issued capital stock and only 2.2% of the total value of its property or assets.

It would seem to be reasonable for the State to require a corporation having a license to carry on business in the State to use at least this small proportion of its capital or assets in the state, or in any event to pay a tax on such proportion at the rate specified, for maintaining its rights in the state and exercising them as it desired. The state grants such privileges each year in advance and the corporation may exercise them by using as much of its capital in the State as may be convenient for it during the year.

The report of appellee showed that the property used by it in Illinois the preceding year was valued at $801.196, and that its local business in that State during such year amounted to 2,868.36. The total value of all its property was more than twice the amount of its capital stock, and its total business during the preceding year amounted to $18,201,955. It therefore appeared that appellee had been exercising its franchise to some extent in Illinois during the preceding year. In renewing or continuing its franchise, the State gave it the right to maintain its privileges and use such part of its capital in carrying on business in the State during the next year as it might desire, without the payment of any additional tax.

II.

The Principle of a graduated fee or franchise tax with a reasonable maximum limit has been repeatedly approved by this Court.

The principal of a franchise tax imposed upon a basis similar to that provided by Section 107 of this Act has been upheld by this Court in several cases. In *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500, the statute of Virginia imposed a franchise tax for authority to do business in the State, which was graduated to some extent upon the amount of authorized capital stock, the fee being $1,000 for all corporations having an author-

ized capital stock of $1,000,000 to $10,000,000. The corporation in that case had an authorized capital stock of $5,000,000 and was therefore required to pay a tax of $1,000 for the privilege of being allowed to perform a single contract in the State which amounted to $85,597. The Court held that such a tax was not arbitrary or unreasonable and did not impose any burden upon interstate commerce.

In the case of *Kansas City, Ft. Scott & Memphis R. R. Co.* v. *Kansas*, 240 U. S., 227, the statute imposed a graduated franchise tax upon corporations, with a maximum limit of $2,500 on capital stock amounting to over $5,000,000. The Court again held that such a tax was reasonable and did not impose a burden upon interstate commerce, or violate the due process or equal protection provisions of the Fourteenth Amendment, although a large part of the property and business of that corporation was outside the State.

In the case of *Baltic Mining Co.* v. *Massachusetts*, 231 U. S., 68, the statute imposed a tax of 1/50 of 1% of the authorized capital stock of foreign corporations for the privilege of doing a local business in that State, with a maximum limit of $2,000 on a capital stock of $10,000,000 or more. The Court held that in view of the limitation and conditions, such a tax was reasonable and

did not necessarily burden interstate commerce or deny the equal protection of the laws to foreign corporations engaged in interstate commerce.

The Court again approved the Massachusetts statute in *Cheney Bros. Co.* v. *Massachusetts*, 246 U. S., 147, in the case of a foreign corporation doing business in that State, and also engaged in interstate commerce. However, after the maximum limit of the tax was removed by that State, and the tax was computed on the entire authorized capital stock, the Court held the statute invalid in the case of *International Paper Co.* v. *Massachusetts*, 246 U. S., 135, on the ground that it thus imposed an unreasonable burden upon interstate commerce and taxed property outside of the State.

The latter case followed the decision in *Looney* v. *Crane Co.*, 245 U. S., 178, in which the corporation had been admitted into the State in 1905, upon payment of a fee which was limited to $200 for a permit to do business for ten years, and thereafter paid an annual franchise tax until the permit was about to expire in 1915. During that time the maximum limit on the permit tax had been removed, thus extending the tax to the entire authorized capital stock. The annual franchise tax was also computed on that basis, or on the issued stock, surplus and undivided profits, in case they exceeded the amount of authorized stock. The Court held the statute invalid as

to both the permit tax and the annual franchise tax, on the ground that it then imposed a tax upon the entire authorized stock or capital of the corporation, without any limitation on the amount of the tax.

The Court in that case and also in the *International Paper Company* case expressly distinguished the other cases cited (*Baltic Mining Co.* v. *Massachusetts*, 231 U. S., 68; *St. Louis Southwestern Ry. Co.* v. *Arkansas*, 235 U. S., 350; *Kansas City, Fort Scott & Memphis Ry. Co.* v. *Kansas*, 240 U. S., 227; *Kansas City, Memphis & Birmingham R. R. Co.* v. *Stiles*, 242 U. S., 111). In those cases, the Court approved statutes which contained provisions qualifying or restricting their operation and effect, such as the subject matter on which the tax was levied, or limitations on the amount of the tax, which restricted it to a reasonable maximum amount for the privilege granted, as in the present case. Those cases are directly applicable here and sustain the tax imposed in this case.

The present case is unlike *Cudahy Packing Co.* v. *Hinkle*, 278 U. S., 460, in which the tax was computed upon the entire *authorized* capital stock, although only two-thirds of such stock had been issued and the total value of the property did not exceed the amount of issued stock. The State there imposed both an additional permit or admission tax and the annual franchise tax

upon the basis of the entire authorized capital stock, and the maximum limit with respect to both kinds of tax was three times the maximum limit of the privilege tax in the present case.

The statute in the *Cudahy* case also differed radically from the statute here involved, in that the tax there was computed solely on a graduated amount of authorized capital stock, without any minimum or increase in proportion to the amount used in that state. The statute thus failed to make any distinction between corporations using little or no capital stock in the state, and those which used a large part or all of their capital in that state. It therefore appeared that no consideration was given to the difference between the value of the mere right to use the privilege granted, and the value of such privilege when largely or fully exercised by the corporation.

In the present case, the statute provides primarily for the payment of an annual license fee or franchise tax for the next year, to be computed at the specified rate upon the proportion of issued capital stock used in the state in the preceding year. However, if the corporation has used a very small part or none of its capital in the state the preceding year, it is apparent that an adequate tax cannot be assessed on that basis for granting or con-

tinuing its privileges for the next year. The statute therefore provides that in such cases a comparatively small minimum fee or tax shall be imposed for the privileges granted for the next year, which is graded to some extent upon the amount of issued stock which may be used in the state, with a low maximum limit on the amount of tax which may be imposed.

These essential and substantial differences in the basis and extent of the tax as imposed in this case clearly distinguishes it from the *Cudahy case* and afford proper grounds for a different conclusion in this case. The tax here imposed is strictly a franchise tax for the privilege granted of doing a local business as a corporation in the state. The amount provided is very reasonable in proportion to the issued capital stock in the several gradations which may be used, and likewise is limited to a comparatively small maximum amount. If such a reasonable excise or franchise tax may not be imposed for the privilege granted, then a foreign corporation may be admitted to do business in this state upon the payment of a trifling amount in the first instance, and may thereafter maintain the right or privilege of doing business in the state from year to year perpetually without any further payment, regardless of the value of the privileges granted by the state and maintained by the corporation.

In this case, appellee admittedly carried on a local business in Illinois and had a substantial amount of its property within the state. Furthermore, it had the privilege of increasing the amount of its property and business in that state during the next year without paying any additional tax, until the application of the rate specified in Section 105 would produce an amount in excess of the minimum tax provided by Section 107 of the Act. The fee charged was an excise or franchise tax for the privilege granted, and was not a tax on property outside the state. There appears to be a reasonable relation between the charge and the privilege granted, which applied to all corporations alike under the same circumstances, and did not discriminate against the appellee in this case.

III.

The Statute does not impose an unlawful burden upon the Interstate Commerce of Appellee or tax property outside the State.

This Court has frequently held that a franchise tax on corporations cannot be held to be repugnant to the commerce clause of the Constitution, merely because it is measured by the capital stock of such corporations. The rule applicable in such cases was clearly stated by the Court in the case of *Hump Hairpin Mfg. Co.* v. *Emmerson*, 258 U. S., 290. The Court there upheld a franchise

tax which was assessed under the Illinois statute against a foreign corporation, and which was computed upon the entire authorized capital stock, although more than nine-tenths of the business transacted consisted of sales made in interstate commerce. In considering the validity of the statute and the tax assessed, the Court said, at page 294:

> "While a state may not use its taxing power to regulate or burden interstate commerce (citing cases), on the other hand it is settled that a state excise tax which affects such commerce, not directly, but only incidentally and remotely, may be entirely valid where it is clear that it is not imposed with the covert purpose or with the effect of defeating Federal constitutional rights. * * *
>
> The turning point of these decisions is whether, in its incidence, the tax affects interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of, or restraint upon it, or whether it affects it only incidentally or remotely, so that the tax is not in reality a burden, although in form it may touch, and in fact distantly affect it."

This case was followed in the recent decision of this Court in *Western Cartridge Company* v. *Emmerson,* 281 U. S., 511, in which it appeared that more than five-sixths of the goods produced in that State were sold and shipped in interstate commerce, which were included in determining the amount of business transacted in that State. In considering the question of the right to include this business, together with the property or capital used in pro-

ducing such goods, for the purpose of fixing a franchise tax, this Court held that the State unquestionably had the power to tax all such property therein and to impose a license fee upon the local business. It was further held that a tax so imposed would not even indirectly burden interstate commerce, or indicate any intention on the part of the State to do so, but that if there was any burden at all, it was indirect and remote and did not violate the commerce clause.

This question was also fully considered in the case of *Kansas City Ry. Co. v. Kansas*, 240 U. S., 227, in which an annual graduated tax with a maximum limit was computed upon the issued capital stock of a railway corporation engaged in interstate commerce. After holding that the State would not be barred from imposing a tax upon the privilege granted, merely because the corporation is engaged in interstate as well as intrastate commerce, the Court said, at page 232-3:

> "And agreeably to the principle above mentioned, it has never been and cannot be maintained that an annual tax upon this privilege is in itself and in all cases, repugnant to the Federal power merely because it is measured by the authorized or paid up capital stock. The selected measure may appear to be simply a matter of convenience in computation and may furnish no basis whatever for the conclusion that the effort is made to reach subjects withdrawn from the taxing authority."

Likewise, in the case of *Kansas City M. & B. R. R. Co.* v. *Stiles*, 242 U. S., 111, in which a franchise tax was measured by the entire capital stock of a consolidated railroad company, it was urged that the statute was void because it taxed property *outside* the State and imposed a direct burden upon interstate commerce. After referring to the discussion of those questions in the above case and stating that it was there held that the State might measure a tax within its authority by capital stock which in part represented property beyond the taxing power of the State, the Court further said, at page 119:

> "So of the objection that the tax imposes a burden upon interstate commerce, the test of validity recognized in previous cases and repeated in *Kansas City, etc., Railway Co.* v. *Kansas, supra*, is the nature and character of the tax imposed. The State may not regulate interstate commerce or impose burdens upon it; but it is authorized to levy a tax within its authority, measured by capital in part used in the conduct of such commerce, where the circumstances are such as to indicate no purpose or necessary effect in the tax imposed to burden commerce of that character. In the present case, the franchise tax is imposed upon the capital stock of a corporation consolidated under the state law, and engaged in both interstate and intrastate commerce. We find nothing in the amount or character of the tax which makes it a burden upon interstate commerce and so beyond the authority of the state to impose."

The same principle applies in the case of a franchise tax measured by the net profits of a corporation. In

Underwood Typewriter Co. v. *Chamberlain*, 254 U. S., 113, an annual franchise tax was imposed by the State of Connecticut upon a foreign corporation, under a formula which allocated 47 per cent of its profits to that State, although only a little over three per cent of such profits were made from sales in the state. It was therefore contended that the tax burdened its interstate commerce and business in other states. The Court held, however, that a tax measured by such profits was entirely valid, although derived in part or mainly from interstate commerce. The Court applied the same principle with respect to franchise taxes measured by net profits in the cases of *United States Glue Co.* v. *Oak Creek*, 247 U. S., 321, and *Peck & Co.* v. *Lowe*, 247 U. S., 165.

This Court has specifically upheld statutes very similar to that involved in the present case, even though in some cases, as in *General Railway Signal Co.* v. *Virginia*, 246 U. S., 500, and other cases, the tax was measured by the authorized instead of issued capital stock, with a maximum limit in the amount of the tax. The difference in the principle of a statute which measures a tax by authorized instead of issued stock, when applied to a corporation having a substantial amount of unissued

stock, however, may well account for the contrary decision in the case of *Cudahy Packing Co.* v. *Hinkle, supra.* The difference also in the basis and general application of the tax is that case from the very limited application and amount of the tax in the present case, would seem to be entirely sufficient to sustain the validity of the statute and the tax imposed in this case.

The application of the statute to appellee in the present case certainly cannot be considered as made for the purpose or as having the effect of defeating Federal constitutional rights. Neither can the tax imposed affect interstate commerce so directly and immediately as to amount to a genuine and substantial regulation of or restraint or burden on such commerce. The statute is clearly designed and intended to impose only a reasonable minimum charge upon all corporations, both foreign and domestic, for maintaining the privilege granted of doing a local business in the State during the next ensuing year, and of exercising such privilege to a limited extent if desired, without any additional charge for so doing. It seems clear that the statute, as so intended and as applied in this case, cannot be deemed to violate the commerce clause of the Federal Constitution, or any provision of the Fourteenth Amendment thereto.

IV.

The United States Circuit Court of Appeals apparently misconceived the nature of the Tax and its effect upon the Business and Property of Appellee.

The opinion of the Circuit Court of Appeals in this case indicates that the Court believed the tax should be in the nature of a property tax, rather than an excise or franchise tax. This is illustrated by the remark of the Court, after stating that appellant (appellee here) offered to pay the amount obtained by applying the first part of Section 105: "In short, appellant had $270,423 of its total assets located in Illinois. It offered to pay five cents on each one hundred dollars of property located in the State" (R. 53). This statement in the opinion is changed as reported in 30 Fed. (2nd) 322.

The amount mentioned by the Court was in reality the alleged amount or proportion of the issued capital stock of appellee represented by both property and local business in this State. As a matter of fact, the actual amount of the total property or assets which appellee had in Illinois amounted to $801,196. This amount, together with the local business transacted in the State the preceding year, which was given as $2,868.36, made a total amount of $804,064.36 for all of the property and business in the State, as stated in the bill and shown by the copy of report attached to the bill (R. 3, 12).

If the privilege tax had been computed at the statutory rate specified in Section 105 on the property admitted to be used in the State, it would have been about three times the amount admitted to be due, without considering the amount of local business transacted in the State. The tax here imposed, however, is an excise or franchise tax for the privilege granted of doing a local business in the State, and the tax is not based upon the amount of property or assets in the State, under either Section 105 or 107 of the Act.

The Court also appears to have approved the distinction which appellee sought to make in the case of *General Railway Signal Co. v. Virginia*, 246 U. S., 500. The tax imposed in that case was apparently a tax upon the right to enter and do business in the State. The tax here imposed is an excise or franchise tax for the renewal or continuation of the privilege granted to do business in the State during the next year. There is no essential difference in the character of the tax imposed in the two cases, and no such distinction was made by this Court in the case of *Looney v. Crane Co.*, 245 U. S., 178, which involved the renewal of a permit tax, as well as an annual franchise tax.

The second point of alleged distinction, that the *General Railway Signal Co.* case contained a maximum tax provision, whereas the last clause in Section 105 of the

Illinois Act contains a minimum provision, ignores the maximum tax provision or limit of $1,000 in Section 107, which was applied in this case. This is exactly the same in substance and effect as the Virginia statute, except that the amount here is less than the maximum limit under that statute. That decision is therefore directly applicable to the present case.

The question considered and decided in *Hanover Fire Ins. Co.* v. *Harding*, 272 U. S., 494, was whether or not an annual tax imposed upon foreign corporations, which was not imposed upon domestic corporations, was an unlawful discrimination which denied the equal protection of the laws to such foreign corporations. That question is not involved in the present case at all, as the minimum fee or tax required under the last clause of Section 105 and specified in Section 107 of the Act is imposed upon both foreign and domestic corporations exactly alike under the same conditions.

The Court also referred to the case of *International Paper Co.* v. *Massachusetts*, 246 U. S., 135, as holding void a statute imposing a tax upon a foreign corporation applying for admission to Massachusetts. The opinion in that case discloses, however, that the tax there imposed was an annual franchise tax, which was applied to the

entire authorized stock of a corporation previously admitted and doing business in the State, after the original statute with the maximum limit of $2,000 had been removed. That case therefore appears to be unlike the *General Railway Signal Company* case and the present case in every essential respect. The Court there also expressly distinguished several other cases of the same character, by reason of provisions qualifying or restricting the operation and effect of the statutes in those cases, which are likewise applicable in the present case.

The last clause of Section 105, together with Section 107, does not in fact provide for an additional or enlarged tax, as the Court appears to have understood. These provisions merely require all corporations to pay a minimum tax in the amount specified in Section 107, with a maximum limit in the amount of such tax, for having the privilege of doing business in the state. The rate provided by Section 105 is not applied at all unless the amount of tax thus computed would exceed the minimum amount fixed by Section 107 for maintaining the right to do business in the state. In such event, the rate under Section 105 becomes effective and the tax is computed upon the proportion of capital stock actually used in exercising the corporation franchise in the state.

The franchise tax specified in Section 107 is not based on the entire capital stock, or capital of a corporation, or computed on that basis. On the contrary, the tax is fixed within graduated limits, with a very reasonable maximum amount for corporations having issued capital stock in excess of $20,000,000. Appellee admittedly has a total capitalization of $36,249,750, with more than twice that amount of property or assets, a substantial part of which are located and used in local business in Illinois. The tax therefore was not imposed upon either the total capitalization or property of the corporation, as was done in the *International Paper Company* and *Crane Company* cases.

The Circuit Court in deciding this case appears to have applied general rules which were applicable to the cases mentioned, but failed to distinguish the different characteristics of the statute in this case. That Court has therefore overlooked the doctrine stated by this Court with respect to the exercise of the taxing power by a state, in the case of *Postal Telegraph Cable Co.* v. *Adams*, 155 U. S., 688, 698: "The substance and not the shadow determines the validity of the exercise of the power". It seems clear that a consideration of the substance of the statute as applied in this case will disclose that it was a valid exercise of the taxing power of the State.

V.

The District Court in its decision construed the Statute correctly and properly dismissed the bill of complaint for want of equity.

The memorandum of views of the District Court in this case clearly sets forth the nature and purpose of the tax imposed under Section 107 of the Act, and distinguishes it from a tax computed at the rate specified in Section 105. After stating the contentions of appellee and setting forth the provisions of the two sections of the statute, the learned Judge of that Court in his opinion said:

> "The two statutes here involved attempt to tax two entirely different things. Section 107 is clearly 'a franchise tax', while Section 105 provided a tax upon 'the exercise of the franchise' and does not become operative until the business done and property used in the exercise of the franchise, measured by the standards provided in Section 105, produce an amount equal to or greater than the amount of the mere franchise tax provided in Section 107. When that point is reached in the exercise of the franchise, then Section 107 ceases to be operative and Section 105 control the amount." (R. 32).

That Court in its opinion also clearly distinguished the *International Paper Company case* and like cases there referred to and followed, including the *Crane Company* case, and showed that the present case comes directly within the principles applied in the *General Railway Signal Company* case. After referring to the priv-

ileges granted to appellee by the State, for which the tax was imposed, and replying to its contentions in regard to the tax, the Court also referred to the comment urged by it on the status of the *Signal Company* case, and quoted the conclusion of Mr. Justice McReynolds in the opinion rendered by him in that case, as follows:

> "Considering what we said in (citing a number of decisions of the Court) the two characteristics of the statute just referred to must be regarded as sufficient to save its validity." (R. 37).

And the District Court added in its opinion herein:

> "The two characteristics referred to by Mr. Justice McReynolds are: (1) That the prescribed fees do not vary in direct proportion to capital stock and that a maximum is fixed: (2) In the class to which plaintiff in error belongs the amount specified is $1,000 and 'under all the circumstances, we cannot say this is wholly arbitrary or unreasonable.'
>
> "So, in this case, we conclude that the case made out by plaintiff's bill may also be along the border line, but the taxing statutes here involved, possessing the two characteristics referred to in the *General Railway Signal Co. case, supra*, must be regarded as sufficient to save their validity."

The statute here involved is more reasonable and closely related to the privilege granted than any similar statute heretofore considered by the Court in any case, in that it provides the issued capital stock instead of authorized stock as the measure of the tax on a restricted scale, and also fixes a very low maximum limit in the tax for the privilege of using the amount of stock to

which it applies. In the present case, the tax amounts to only $1 for each $36,249.75 of the issued capital stock, and in no case could the maximum tax amount to more than $1 for each $20,000 of such stock. The imposition of such a small franchise tax for the valuable privilege granted and actually exercised by appellee in this case is not only reasonable but could not burden interstate commerce or tax property outside the State.

The fact that appellee actually has some property and is transacting some business in the State does not affect the right of the State to impose the minimum tax against it, as provided by Section 105 and 107. Appellee is required to pay no more than other corporations with a like amount of capital stock, but which merely maintain their right to do business in the State, and therefore it cannot complain on that ground. The contention urged by appellee would clearly discriminate against such other corporations and in favor of those actually having a comparatively small amount of property and business in the State. Such a construction would necessarily invalidate Section 107 and leave the State without any power to impose any franchise tax for granting the privilege to corporations to do business in the State from year to year.

The memorandum of the views of the District Court shows that the privilege granted to a foreign corpora-

tion is a valuable privilege, even though it may not be immediately exercised to any great extent in doing a local business in the State. As the Court stated, the value of the franchise necessarily bears a most legitimate relation to the amount of capital stock which may be used in the exercise of the franchise. The grant of such a privilege to the corporation gives it the right to use as much of its capital stock as it may see fit in the exercise of its franchise in the State. This clearly affords a valid basis for imposing a franchise tax on such a corporation, measured to some extent by the capital stock which may be used, with a reasonable limit in the maximum amount of tax which may be imposed for the privilege granted.

For the foregoing reasons, it is respectfully urged that the statute as applied in this case does not violate any provision of the Federal Constitution or the Fourteenth Amendment thereto, as alleged in the bill of complaint, and that therefore the judgment of the Circuit Court of Appeals in this case should be reversed and that the decree of the District Court should be affirmed.

Respectfully submitted,

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